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INSURANCE SUPERVISION AND NATIONAL IDEALS.*

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WITHIN twenty-five years what may be called the "insurance principle" has come to be a notable factor in the traffic, credits, commerce and family life of this country. Invited by trunk-line railroads, the telegraph, the telephone and the encouragement of a homogeneous people, the tendency of all our activities has been to expand. Insurance has kept pace with the opportunity. It now has, through its various forms, relations with substantially every man, woman and child in the Republic, and has large international relations as well. It operates everywhere under governmental supervision. In this country alone it must obey the behests of forty-six different Legislatures, each of which claims sovereign authority not only over its activities in that particular State, but, in effect, over all its activities throughout the world. A mere statement of the situation prepares the mind for the confusion and injustice which characterize insurance supervision as it exists to-day in the United States.

* The substance of this article was delivered as an address before the University of Missouri, on February 16th, 1909.

The problem which faces the management of every active insurance company is, How may it profitably, effectively and peacefully serve forty-six masters? The problem is unsolvable. Under the present practice of insurance supervision, there is no remedy. But there is elsewhere a remedy, and, to many people, it seems to be the only remedy, *viz.*, Federal supervision of interstate insurance.

I by no means think that Federal supervision would bring in the millennium, but it would be a long step away from the chaotic and destructive tendencies which have developed under the existing plan. Is Federal supervision possible? In view of the decision of the Supreme Court—made not once, but several times—is there any probability of such relief?*

Relief through an amendment to the Constitution of the United States would be effective, but that is practically unattainable and probably unnecessary.

Is there not a great deal in the history of the nation, in the development of national sentiment and national ideals, since the Constitution was adopted, which suggests not only the probability, but, under an increasing necessity, the certainty that interstate insurance will ultimately come under Federal control? I think, and I shall endeavor to show, that there is.

To one who studies the history of the nation under the Constitution, it is perfectly clear that, but for the wisdom of the great men who interpreted that immortal instrument during the early years of its operation, national development might have taken on a form that would have defeated the purposes of the men who planned it. It is probable that we as a people owe almost as much to Marshall, the great Chief Justice, who gave the Constitution its national meaning, as to the men who drafted it. The doctrine which Marshall laid down, which has now come to be perhaps as fixed in its meaning as the Constitution itself, is substantially this:

"The action of the General Government should be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; while to the States is reserved the control of those matters which are completely within a particular State, which do not affect other States, and with which it is not necessary to inter-

* Paul *v.* Virginia, 8 Wallace, 168; Hooper *v.* California, 155 U. S., 646; Cravens *v.* New York Life-Ins. Co., 176 U. S., 962.

fere for the purpose of executing some of the general powers of the Government."*

Many of the problems which have arisen since the adoption of the Constitution involve the question of whether it is necessary for the General Government to "interfere" with certain business activities for the purpose of executing some of its general powers. Is it necessary now, is it likely to become increasingly necessary, that the Government should interfere in insurance for the purpose of executing some of its general powers?

In order to consider what the probabilities of Federal supervision are, it will be profitable to review briefly some of the things that have happened in the course of our national development.

The radical difference between government as it existed under the old Confederation and government as it has grown up under our Constitution is this: The Confederation was strictly a union between independent States acting as States; our present government is a union between States in which the Central Government acts directly upon the individual citizen, and not upon the States composing the union.

The difference between the two kinds of government does not at first blush seem to be great, but, as a matter of fact, the two types are almost as far apart as the poles.

The departure involved in the new type was much clearer to our forefathers than it is to us. Under the Confederation they had won independence. They recognized the pressing need of a different and a stronger plan, but about the old plan clustered traditions and the memory of struggles which went back almost to Jamestown and to Plymouth. In order to create the beginnings of a nation, they had to exercise a forbearance, a charity and a wisdom, which are a constant source of wonder to the student of that period. The Constitution they evolved was a series of compromises—compromises between the larger and the smaller States, compromises with slavery, compromises all through. The great principle then adopted, however—which has more and more asserted itself, which has developed the instinct of nationality, which preserved the nation through a fearful war, which has developed it territorially from the Atlantic to the Pacific and across the Pacific—is that the General Government acts for the general welfare, that it acts directly on the

* Gibbons *v.* Ogden, 9 Wheaton, 1.

individual and acts in whatever way may be necessary for it to act for the purpose of executing its general powers.

The people of the several States were passionately devoted to their local sovereignty. The project of a new style of government was commended to them, primarily, by the need of commercial peace between the States and with foreign countries. The situation substantially compelled them to recognize the necessity of a Central Government strong enough to keep the peace and regulate commercial intercourse. The Revolution itself had been largely brought about by commercial considerations. The British Government sought to keep the Colonies in subjection for purposes of favorable trade, and against this the Colonies rebelled. After independence had been won a situation bordering on anarchy quickly arose. Foreign countries were unwilling to enter into treaties with the United States under the articles of Confederation. The Confederation had no control over commerce, and commercial war in a variety of forms soon broke out. This condition, growing out of the feebleness of the Confederated Government, resulted in a deep and general conviction that commerce ought to be regulated by Congress, and found expression in the commerce clause of the Constitution. As to the breadth of the powers contained in this clause, Chief-Justice Marshall said:

> "It is not, therefore, a matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States."

The departures of the new instrument from the old were so radical that many of the States hesitated about accepting them, and yet, as we can see now and as they came to see, there was nothing else for them to do. It was this or anarchy.

Steadily the national ideal gained ground. Slowly the General Government extended its operations from the external concerns of the nation and from those internal concerns which affect the States generally, to those with which it was necessary for it to interfere, and with which it had the right to interfere through its direct operation on the citizen, for the purpose of executing its general powers.

The burden of the new Government, with its more or less undefined relations to the States, with its powers undeveloped,

soon fell on men who were supposed to be least in sympathy with the national idea. An emergency which put them to the test quickly arose. In the struggle for the possession of the Mississippi, Jefferson proposed, and Congress authorized, the purchase of the Island of Orleans and what was called West Florida. In the end they bought the whole ancient province of Louisiana, a tract of land richer and larger in area than the original thirteen States. Jefferson believed that in signing the treaty of purchase he had "done an act beyond the Constitution." He could find in the Constitution no authority for such a proceeding. His friends believed that in the treaty-making power he had sufficient authority, and Chief-Justice Marshall, in 1828, confirmed that view in an important decision when he said:

"The Constitution confers absolutely on the Government of the Union the powers of making war and making treaties; consequently, that Government possesses the power of acquiring territory either by conquest or treaty."

With an instinct which foreshadowed the decision of Marshall, the people had approved the act; they recognized that it was clearly in the line of national aspirations, that it tended to insure the peace and the safety of the Republic. This was perhaps the first great instance in which, by interpretation of the Constitution and by acquiescence on the part of the people, a way was found to extend the powers of the Government.

Following the path upon which Jefferson first entered, we purchased Florida, we discovered, explored and settled the Oregon country, we annexed Texas on the petition of its people. We acquired California, Nevada, Arizona, New Mexico and portions of Colorado and Oklahoma. We purchased Alaska. We annexed Hawaii on the petition of its *de facto* government. We took the Philippines, Porto Rico and Guam. And in five of these cases, additions to our territorial domain were made and the highest function of sovereignty was exercised when the Federal Government was under the control of the party popularly known as the party of strict construction.

Twelve amendments were made to the Constitution during the first fifteen years of its existence. During the next sixty-two years none was made. In this era the Constitution was being interpreted. The Executive and the Courts were slowly finding out the powers granted to them either specifically or by implica-

tion, and they found all that was necessary to carry on the National Government. The growth of Federal power during that time was very great, and in that period the citizens of the States transferred to their national citizenship a large part of the love and reverence which they had formerly bestowed upon their State citizenship. The conviction constantly increased that, under the Union and the Constitution, there was, upon the whole, better freedom and greater happiness than could possibly be secured in any other way. The purchase of Louisiana and the second war with Great Britain led the administration irresistibly along the path of a liberal interpretation of the Constitution. They may not have altogether liked it. There was nothing else for them to do. The embargo which they had denounced in 1793, they employed in 1807. The United States Bank, which they had denounced in 1791 and refused to recharter in 1811, was rechartered by an almost unanimous vote in 1816. They followed so closely the lines laid down by the Federalists that Josiah Quincy declared the Republicans had out-Federalized Federalism. But the triumphs of both parties were the triumphs of national ideals.

The supreme event in the development of national ideals came to an issue in 1860. African slavery existed in every State of the Union but one when the Constitution was adopted, and its status under the new Government was one of the compromises of the Constitution. The words "slave" and "slavery" were carefully avoided in wording that instrument, and it was then the general opinion that the institution would gradually die out. The ordinance of 1787, one of the last enactments of the old Confederation, assented to by all the States, had consecrated the Northwest Territory to freedom, but the Louisiana Purchase contained no such provision, and over the settlement and government of that vast region was ultimately waged a conflict which tested the vitality and established the power of the nation. During the years which preceded this conflict, the anti-slavery party pursued its ideal of limiting slavery within a certain area, while the pro-slavery party persistently followed its purpose of protecting slavery in the unorganized territory of the country and in the erection of new slave States whenever the people so desired. Both parties claimed the sanction of the Constitution.

We sometimes lose sight of the great issue of that fearful strug-

gle. We have just celebrated the centenary of the birth of Abraham Lincoln, whose election to the Presidency precipitated the conflict. We have heard much of Lincoln the "Emancipator," and we have been told that the Civil War was fought in order to abolish slavery. Lincoln knew better than this. He realized that the great thing to be done was to preserve the Union and the principles of government and of nationality which it embodied. When he thought that such action would help to save the Union, he issued the Emancipation Proclamation. But it was a war measure, distinctly unauthorized by the Constitution up to the time of the adoption of the Thirteenth Amendment.

Another long struggle which resulted in a great advance in national ideals took place in the field of finance. When the Constitution was adopted, the nation as such had no revenue, no credit. But Alexander Hamilton, the first and greatest Secretary of the Treasury, putting into effect the powers granted by the Constitution, soon wrought what seemed a miraculous change. As Webster said: "He smote the rock of the national resources, and abundant streams of revenue gushed forth. He touched the corpse of public credit, and it sprung upon its feet." One of the means employed was a United States Bank chartered by Congress. The strict constructionists contended that the Government had no authority to charter a bank. Its right to do so was upheld by the Supreme Court on the ground that it was a suitable agency in borrowing money, which the Government had an undoubted right to do. The contest was a long and bitter one, and the strict constructionists refused to recharter the bank in 1811, but were glad to do so in 1816 when the currency had been demoralized by the second war with Great Britain. Prosperity brought some abuses and all the old rancor, and the bank was discontinued in 1836, and an era of wild-cat money followed in certain sections which lasted until the Civil War. Again the banks suspended specie payments, and the Federal Government issued legal-tender notes, established the national banking system and finally taxed State bank issues. The first and last of these acts were opposed as unconstitutional, but they were upheld by the Supreme Court.* Thus what is peculiarly a prerogative of sover-

* McCulloch *v.* Maryland, 4 Wheaton, 316; Legal-Tender Cases, 12 Wallace, 457; 110 U. S., 447; National Bank *v.* United States, 101 U. S., 1.

eignty was transferred from the States to the National Government through a process of interpretation, in response to national needs and through interference which was necessary in order to carry out the general powers of the Government.

Let us consider a little more closely the logic by which this great transformation was accomplished. We may find some comfort therein. Fifty years ago, if any one had said that within ten years we should have only national currency and none issued by State banks, he would have been laughed at. Where would Congress find authority to take this prerogative away from the States? Let us follow the Supreme Court's logic.

The Constitution gives Congress power "to borrow money on the credit of the United States and to coin money, regulate the value thereof, and of foreign coin." The Constitution as a whole makes the United States a sovereign nation. Now, notice the links in the chain of reasoning. Congress has power to borrow money; therefore, it may charter a bank as an aid in borrowing money. A bank so chartered may be taxed by the States only in such a manner as Congress permits. Congress may borrow money, and the United States is a sovereign nation; therefore, it may emit bills of credit and make them legal-tender. Congress has power to borrow money; therefore, it may enact a national banking law authorizing banks thereunder to issue circulating notes based on the security of United States bonds deposited with the Government. Congress may borrow money; having under this power undertaken to supply the country with a stable currency, *it may prevent the circulation as money of any notes not issued under its authority by taxing all other issues out of existence.*

This was going a long way; it was clearly one of the occasions when Congress found it necessary to "interfere," for the purpose of executing its general powers.

The States ceded to Congress under the new Constitution the power to regulate commerce with foreign nations and among the several States and with the Indian tribes, but they found it difficult to take their own medicine. It was not easy to give up this prerogative of sovereignty. Almost immediately the question arose, What is commerce? It was soon decided that commerce was something more than traffic or trade,—it included transportation, transportation of passengers as well as of goods.

When steam came into use as a motive power that became an issue; but it was decided that commerce included all the means as well as the subjects of transportation. When the electric telegraph came into use, it was decided that this was a medium of commercial intercourse. When the telephone came into use, the same reasoning made its use between States interstate commerce. At first Congress was considered as having jurisdiction only over waters affected by the tide, but this authority was soon extended to all navigable waters upon which interstate commerce is carried on, and to bridges over navigable waters separating two States. At the present time the authority of Congress extends to the places, the means and the subjects of trade and commerce.*

We have moved on into what is almost a new world. We are facing new problems. We are facing the further development of national ideals. We cling as tenaciously as our forefathers did to what we call the right of local self-government. What we are now and then asked to give up seems to us much more vital than what they were asked to surrender in the general interest. We have the most extended system of railroad transportation in the world. The use of the telegraph and the telephone has extended throughout the nation. Many important types of business are organized on continental lines. The question, then, is: When we insist on what we call local self-government as against the obvious significance of such facts as these, are we not as short-sighted as our forefathers would have been if they had carried their opposition to the Constitution further than they did? The fact is, we are still entirely devoted to local self-government. But what is local self-government? When a business naturally extends over all the States of the United States, is it local self-government to attempt to regulate it in forty-six different places by forty-six separate sovereign authorities? Under these conditions, is not the local idea plainly encroaching on the national prerogative?

On all these large questions the Government has not acted until it was obliged to. There has been no aggression as against the States. Looking back at these contests—in which the issue

* Gibbons *v.* Ogden, 9 Wheaton, 1; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196; Moran *v.* City of New Orleans, 112 U. S., 69; Passenger Cases, 7 Howard, 283; Walling *v.* Michigan, 116 U. S., 446; Tel. Co. *v.* Texas, U. S., 460; Pa. Tel. Co., 48 N. J., Eq. 91, 20, Atl. 846, 27 Am. St. Rep., 462.

was frequently doubtful—we see that no other solution was possible, that there was nothing else for the Government to do.

The chaotic condition which existed in the commerce between the States was, as we have seen, one of the things that drove the States toward a "more perfect union." That condition, in a more or less aggravated form, has existed in insurance for eighty years. In 1829, Pennsylvania levied a tax of twenty per cent. on the premiums of other-State companies. This was done under the familiar plea of protecting the business of domestic corporations. There was a similar tax of ten per cent. in New York from 1828 to 1837. In 1851, New York by means of a deposit law drove all other-State companies but two beyond its borders, and when the other States retaliated, the New York State companies withdrew from them. In 1874, California by radical legislation drove twenty-nine companies out of her jurisdiction. Recently nearly all the life companies withdrew from Texas and Wisconsin because of oppressive legislation, and eight withdrew from New York State for the same reason. A Missouri law allows no company to do business within her borders which pays salaries above a certain limit. Many of the States refuse admission to companies of other States unless they in advance agree to surrender the protection of the Federal Courts, and to that extent their rights under the Constitution of the United States. Most of the States have on their statute-books, in their insurance laws, that relic of barbarism, the *lex talionis,* the law which exacts an eye for an eye, a tooth for a tooth. The condition is becoming progressively worse. It is akin to those which existed one hundred and twenty years ago with respect to commerce. It is not unlike those which then existed regarding foreign intercourse, public credit, currency and that comity between States which makes for union and peace. The problems of commerce, of expansion of public credit, of currency were solved by the action of the General Government either through its expressed or its implied powers. There is apparently no other method by which the problem of insurance supervision can be solved.

Insurance is business. It includes the purchase and sale of contract rights which have become an almost indispensable factor in business, in credit and in traffic. It is a business that from its very nature is most secure when widely distributed, and it naturally and inevitably has become an interstate business. It is

a business which from its character requires a reasonable measure of governmental supervision, and at the present time it is more extensively supervised by governments than any other class of business. There is, perhaps, no business in which efficiency and economy are so much promoted by uniformity of legal requirements everywhere; no business that is more easily embarrassed, harassed and rendered inefficient and unprofitable by conflicting laws and conditions.

But the Supreme Court, in the case of Paul *vs.* Virginia, has said that insurance is neither commerce nor an instrumentality of commerce. The transportation of goods and passengers is commerce, and all the means used as instrumentalities thereof are commerce. The sale of goods by sample by drummers is commerce, but the sale of life-insurance policies by agents is not commerce. A telegraphic message relating to a life-insurance policy — or any other kind of business — is commerce, but the policy itself, sent by mail or otherwise, is not commerce. If a company talks to an insurant in a neighboring State over the telephone the talk is commerce, but the subject of the talk is not.

Toward these decisions of the Supreme Court we maintain the attitude that Lincoln assumed toward the Dred Scott decision. He said:

> "It is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country. . . . The Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it."

While the Supreme Court has several times flatly said that insurance is not commerce, I think it by no means impossible that later on it may take a different view. I am not sure that it has not already done so. The relations of things have changed. And wise courts interpret constitutions in the light of changed conditions and in the interest of all the people.

I have briefly reviewed some of the instances in the history of the country which have resulted in the development of national ideals and the expansion of national power. My purpose has been to show that Congress, under the Constitution and under the wise rulings of the Supreme Court, has always had power sufficient to meet any emergency, and that such emergencies have

always been met in the interest of the whole people. I might rest here and have, I think, a very good case. Having pointed out the inevitable chaos and confusion which have followed the attempt entirely to supervise the business of insurance by forty-six different authorities, having shown the hopelessness of any attempt to secure efficient administration through harmony of action amongst the States, it is a fair deduction that a business involving such large interests, capable of such great usefulness, a business so necessarily interstate in its nature, is entitled somehow, some way, to just supervision and wise control. And as that cannot be had under the present system, relief from the General Government must in time come by force of circumstances and through the logic which has so nobly served the people from the time of John Marshall to the present day.

The force of such conditions has already asserted itself, and unless I misread the mind of the Supreme Court in a leading case relief from an illogical and reactionary condition is already in sight.

In 1902, the Supreme Court of the United States, in its interpretation of the powers of Congress under the commerce clause of the Constitution, went farther than ever it had gone before. The case before the Court was that of Champion *vs.* Ames, and is known as the "Lottery Case."* By this decision the validity of an act of Congress for the suppression of lottery traffic through international and interstate commerce and the postal service was sustained. As I read the entire case, the previous declarations of the Court that insurance is not commerce are therein substantially overruled; and, under the doctrine laid down, it seems reasonably clear that, if Congress should now pass an act providing for Federal supervision and regulation of interstate insurance, the Supreme Court would be bound to sustain it.

Counsel for the lottery company urged that a contract of lottery was substantially the same as a contract of insurance, and that the principle in the two could not be distinguished. The minority of the Court, for whom Chief-Justice Fuller delivered the dissenting opinion, urged the same doctrine, and pointed out that the Court had already decided that insurance contracts are not articles of commerce; that they are not subjects of trade and barter offered in the market as something having an existence and

* Champion *v.* Ames, 188 U. S., 492.

value independent of the parties to them; that they are not commodities to be shipped from one State to another and then put up for sale — the logic of which was that the sale of lottery-tickets, being indistinguishable in principle from the sale of insurance policies, must necessarily fall outside the commerce clause and outside the regulating power of Congress. In effect, therefore, the relation of insurance to the commerce clause of the Constitution was before the Court and was fully discussed. Not only was it discussed in the briefs of the appellant, but it was apparently a part of the oral argument; and the case of Paul *vs.* Virginia was the leading case upon which the minority of the Court based their dissent.

In delivering the majority opinion of the Court in the lottery case, Mr. Justice Harlan, singularly enough, made no reference to the insurance cases. Insurance, as such, was not before the Court, and there was, therefore, no controlling reason why the Court, if it believed that the doctrine laid down in Paul *vs.* Virginia was an error, should so state. If, however, a majority of the Court believed that the sale of lottery-tickets could be distinguished in principle from the sale of insurance policies, it is fair to assume that they would have said so. The argument of the lottery people was: Lottery is like insurance; therefore, it is not commerce. The Court decided, without refuting the argument on that point, that the interstate sale and carriage of lottery-tickets is commerce. In reaching this decision, the Court sought first for a definition of the word "commerce" as used in the Constitution, and, amongst other things, said:

"Undoubtedly the carrying from one State to another by independent carriers of things or commodities that are ordinarily subjects of traffic and which have in themselves a recognized value in money constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another by independent carriers of lottery-tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce amongst the States?"

After various citations, seeking rather to arrive at a definition of what commerce is, the Court said:

"They [the cases cited] show that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons and the transmission of messages by telegraph." (He would now add transmission of messages by telephone.) "They also show that the

power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions of the exercise of the power as are found in the Constitution of the United States."

Then, without specific reference to that case, the Court met the doctrine laid down in Paul *vs.* Virginia in this language:

"It was said in argument that lottery-tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value."

This language is very significant. In logical effect it overrules the doctrine laid down in Paul *vs.* Virginia. It intimates that an interstate transaction may be commerce even if the article transported has no value in itself. But, finding some actual value in a lottery-ticket, the Court brushed all other considerations aside and said: "Lottery-tickets are subjects of traffic, and therefore subjects of commerce."

Every element of value which the Court found in lottery-tickets exists also in insurance policies. The Court found that lottery-tickets had value because of a large capital prize to be paid to the holder of the winning ticket, because of large deposits of money in different banks in the United States insuring the prompt payment of prizes. Lottery-tickets were subjects of traffic because they could be sold, and they had a value even in States which made the drawing of lotteries illegal. The parallel between such conditions and those which attach to insurance is almost perfect.

Whether the Court recognized at the time that the doctrine in Champion *vs.* Ames overrules the doctrine in Paul *vs.* Virginia, must be a matter of opinion until a direct test is made under similar conditions; but it is evident from the text of the two opinions then rendered that there was a vigorous interchange of ideas between the various members of the Court before the opinions were arrived at.

"Could Congress," asked the Chief Justice, "compel a State to admit lottery-matter within it contrary to its own laws?" And the answer of the majority opinion clearly would be, "Yes, Congress could." It would simply be unwise legislation, and by way of rebuttal the majority opinion adds:

"The possible abuse of the power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. The remedy is that suggested by Chief-Justice Marshall when he said: 'The wisdom and the discretion of Congress, their anxiety for the people and the influence which their constituents possess at elections are in this, as in many other instances, the sole restraints on which they have to rely to secure them from abuse.'"

Apparently anticipating that some one might misconstrue the effect of the lottery decision, the Court said:

"We decide nothing more in the present case than that lottery-tickets are subjects of traffic among those who choose to sell or buy them; the carriage of such tickets by independent carriers from one State to another is, therefore, interstate commerce."

Insurance, with a hesitancy which is not readily understood, has never made any serious attempt to secure action by Congress. The insurance cases went before the Court supported by no declaration from Congress that the business is commerce,—a situation which itself invited an adverse conclusion. Whenever the question has been raised since then, Paul *vs.* Virginia and the other cases in which opinion has followed the doctrine of that case have been cited, and the matter has been dropped as hopeless. But the lottery case has vastly changed the whole situation. These insurance cases may now be treated as Lincoln treated the Dred Scott decision. They "have not quite established a settled doctrine for the country." The lottery case affords abundant warrant for a request that Congress now act. A law should be drawn on the theory that interstate insurance is commerce, and that the power of Congress to regulate insurance in its interstate relations is absolute. Presented with such an act, the Supreme Court would, we believe, be disposed to accept the declaration by Congress that interstate insurance is commerce and is subject to control by Congress. If a case were to arise under such an act, it is difficult to see how the Court could render any different decision from that in the lottery case. In the lottery case the Court was probably seeking to put an end to a great public evil, to abate a great public scandal. It was obvious that the evil would not and could not be ended by the States, and therefore the power to deal with the situation, which must lie somewhere, was recognized as being in Congress under the commerce clause.

Insurance would present a case in which the law and the Court would be invoked, not to abate or destroy an evil, but to conserve and protect a great public utility. It probably would not go before the Court with the pressure of a wide-spread public demand behind it. It would go before the Court stating, first, that it is commerce; second, that it is in distress and confusion and needs the relief which a single authority alone can give; third, that it is irrationally supervised; fourth, that it is harassed by a multitude of exactions and requirements; fifth, that it is unequally and unjustly taxed; sixth, that its operations are, in practice, almost universally interstate and often international; and, seventh, that the governmental regulations which it now observes have begun to narrow its field of activities, a condition which, carried to its logical conclusion, threatens ultimately to limit the operations of every insurance company to the State of its domicile.

There must be relief somewhere. The problem will not be solved by the States. It cannot be. The solution lies in the commerce clause of the Constitution, and an act of Congress, drawn on the theory I have suggested, would bring insurance before the Court in a proper way. It would be able to present its just claims, and they could be argued from the standpoint of a powerful precedent. So presented, the question would at least be settled and insurance would know finally whether it may go forward or not.

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